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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 525

MORTON SALT COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TWENTIETH CENTURY PRESS, INC., CHICAGO 6

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Faced with the undeniable fact that the court below erroneously approved the application of the "proportionate profits" formula to compute the gross income from mining of the taxpayer, an ordinary miner who actually sells substantial quantities of the mineral at the cutoff point determined by the court below, the Government has been forced to the tenuous argument that the "method of constructively computing the gross income from mining after the cutoff point to mining has been determined" was not an issue before the court (Mem. p. 4).

This argument is readily refuted by reference to certain Stipulations entered into by and between the parties

through their respective attorneys of record, which Stipulations were filed in the court below and are a part of the Record filed in this Court. One of these Stipulations was entitled "Stipulation Of Parties With Respect To Reservation Of The Determination Of The Amount Of Recovery" and was filed in the court below on May 20, 1960. It read, in part, as follows:

> "The basic issue involved in the above entitled cause is the proper determination of plaintiff's basis for percentage depletion under Sections 23(m) and 114(b)(4) of the Internal Revenue Code of 1939, as amended, with respect to the years 1951, 1952 and 1953 and under Section 613 of the Internal Revenue Code of 1954, as amended, with respect to the year 1954."

The other of these Stipulations was entitled "Stipulation Of Parties With Respect To Part Of The Relief Sought In The Petition And The First Supplement To Petition" and was filed in the court below on June 13, 1960. It read, in part, as follows:

> "As a result of the instant stipulation, there remains for decision by this Court only one issue, namely, the correct basis upon which to compute plaintiff's allowance for percentage depletion."

Thus, it is clear that the issue before the court below was the proper determination of petitioner's basis for percentage depletion. As indicated by the heading and provisions of Sec. 114(b) of the Internal Revenue Code of 1939, the "Basis for depletion" encompasses (a) the applicable rate, (b) the determination of the gross income from mining, and (c) the 50% of net income limitation (Pet. App. A, pp. 17-19). Since there is no argument as to the applicable rates for the years in question (Mem. p. 1), the determination of petitioner's "basis for depletion" depended upon the court's conclusions with respect to the determination of petitioner's

gross income from mining and the application of the 50% of net income limitation.

Having concluded that the cutoff point for the salt industry was bulk sales of screened and dried rock salt and evaporated salt, the court below then held that the Commissioner of Internal Revenue was correct in applying the "proportionate profits" formula (Pet. App. B, pp. 55, 87-89) to compute the petitioner's gross income from mining. The trial court in a suit for refund has to rule on the method of computing gross income from mining after establishing the cutoff point. How else can it be determined whether or not the taxpayer is entitled to recover? There can be no allegation here that there were not sufficient facts in the record to permit a computation according to a method approved by the court for the reason that the parties hereto had stipulated that "the trial of the above entitled cause shall be limited to the issues of fact and law relating to the right of the plaintiff to recover, reserving the determination of the amount of recovery, if any, for further proceedings." (Stip. *supra*, filed May 20, 1960).

It is manifest then that the method of computing the gross income from mining after the determination of the "cutoff point" (or, more properly in this case, the "ordinary product") was before the court below and was decided by the court below. In approving the application of the proportionate profits formula the court below was clearly in error and the decision is in conflict in varying degrees with eight other decisions as pointed out in the Petition. The patent fallaciousness of the Government's principal argument extends to its cursory treatment of the claims of conflict. When counsel is unable to refute the position of an adversary with respect to the application of court decisions, counsel is often prone to urge that such decisions do not apply. Here the only supporting argument against the

claims of conflict is the spurious claim that only a very limited issue was before the court below. As that claim falls so does the Government's entire argument in opposition.

As touched on in the Petition, this case is vitally important to the salt industry and to all ordinary miners similarly situated. It is a particularly appropriate one for the resolution of the percentage depletion controversy with respect to the salt industry in that it contains the following elements:

a) It involves the years 1951, 1952, 1953 and 1954, the first four years in which miners of sodium chloride (salt) were entitled to a percentage depletion allowance.

b) It involves the percentage depletion allowance for sodium chloride under both the Internal Revenue Code of 1939 and the Internal Revenue Code of 1954.

c) It involves a taxpayer which extracts salt by both the dry mining method (rock salt) and the hydraulic mining method (evaporated salt) and which, in two producing areas, employs both mining methods to extract salt from the same solid deposit.

d) It involves a taxpayer which produces all the salt products produced by the industry in the three basic categories, namely, rock salt, evaporated granulated salt and evaporated grainer or flake salt.

e) It involves a taxpayer which has a plant in each producing area in the United States.

f) It involves findings of fact which are detailed and extensive and not controverted and which are based on a record which was either stipulated by the parties or presented without contradiction. These findings of fact cover the operations of the salt industry in general as well as the taxpayer in particular.

The failure of this Court to review and decide this case would perpetuate the discriminatory treatment of competing salt producers which has been accorded them to date by the Internal Revenue Service and which, as is apparent from the Memorandum In Opposition, the Government is determined to continue. Even the "uniform" application of a "proportionate profits" formula to all salt producers (which is not appropriate as witness the *United Salt* case) contains within itself a lack of uniform treatment because of the inevitable cost differences among competing salt producers. While this discrimination might be unavoidable where no other appropriate method of determining the depletion base exists, it is clearly to be avoided where the trial court, as in this case, finds that all miners sell the ordinary product upon which the percentage depletion allowance is to be based, here screened and dried salt in bulk form.

For the reasons set forth above and in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November, 1963.